

UNITED STATES OF AMERICA

DEPARTMENT OF ENERGY

OFFICE OF FOSSIL ENERGY

SABINE PASS LIQUEFACTION, LLC

)
)
) FE DOCKET NO. 10-111-LNG

OPINION AND ORDER
DENYING REQUEST FOR REHEARING
OF ORDER DENYING MOTION FOR LATE INTERVENTION,
DISMISSING REQUEST FOR REHEARING OF ORDER NO. 2961-A, AND
DISMISSING MOTION FOR A STAY PENDENTE LITE

DOE/FE ORDER NO. 2961-B

JANUARY 25, 2013

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. BACKGROUND.....	3
III. SIERRA CLUB'S POSITION.....	5
A. Sierra Club's request for rehearing of the order denying its motion to intervene out of time	
1. Good Cause	
2. Undue Prejudice	
B. Sierra Club's request for rehearing of Order No. 2961-A and motion for a stay <i>pendente lite</i>	
IV. SABINE PASS' ANSWER TO MOTION FOR A STAY <i>PENDENTE LITE</i>.....	9
V. DISCUSSION AND CONCLUSIONS.....	11
A. Sierra Club has not demonstrated good cause to grant its motion to intervene out of time.	
B. Sierra Club has not demonstrated that it would be unduly prejudiced by a denial of its intervention whereas the record shows that a grant of Sierra Club's request to intervene would unduly prejudice the applicant.	
C. Sierra Club lacks standing to seek rehearing of the substantive determinations in Order No. 2961-A and the request for rehearing will be dismissed.	
D. Because Sierra Club lacks standing to seek rehearing and judicial review of Order No. 2961-A, its motion for a stay <i>pendente lite</i> will be dismissed.	
E. Even if Sierra Club had standing to seek rehearing and judicial review of Order No. 2961-A, its motion for a stay <i>pendente lite</i> would be denied.	
ORDER.....	24

I. INTRODUCTION

Pursuant to section 3 of the Natural Gas Act,¹ the Department of Energy (DOE) will authorize the export natural gas, including LNG, unless the Department finds that the proposed export will not be consistent with the public interest. The Federal Energy Regulatory Commission (FERC or Commission) holds complementary authority delegated by the Secretary of Energy to authorize the siting, construction, and operation of LNG terminals. Like DOE's authority, the Commission's delegated authority is exercised under NGA section 3.

On May 20, 2011, DOE's Office of Fossil Energy (DOE/FE) issued Opinion and Order No. 2961 (Order 2961) conditionally granting the application of Sabine Pass Liquefaction, LLC (Sabine Pass) for authorization to export liquefied natural gas (LNG) to nations with which the United States has not entered into a free trade agreement providing for national treatment for trade in natural gas (non-FTA nations). The permitted exports would be from liquefaction and related facilities to be constructed at the Sabine Pass LNG Terminal (Terminal), an existing terminal in Cameron Parish, Louisiana. The existing Terminal was previously approved by the FERC for imports of LNG and re-export of foreign-sourced LNG. The proposed additional facilities (the Liquefaction Project), however, are intended for exports of domestically produced LNG, and thus require separate approval by the FERC.

In conditionally authorizing the proposed exports of domestically produced LNG, DOE/FE reviewed a number of public interest considerations and determined that interveners and other participants had not demonstrated that the proposed authorization would be inconsistent with the public interest, as would be required to deny the application. As relevant here, DOE conditioned the export authorization on (1) satisfactory completion of the environmental review of the Liquefaction Project in the related proceedings at the FERC; and

¹ 15 U.S.C. § 717b.

(2) issuance by DOE/FE of a finding of no significant impact (FONSI) or a record of decision (ROD) pursuant to the National Environmental Policy Act (NEPA).²

On August 7, 2012, in light of action by the FERC, DOE/FE issued a FONSI regarding the proposed exports of domestically produced LNG and also issued Order No. 2961-A, its *Final Opinion and Order Granting Long-Term Authorization to Export Liquefied Natural Gas from Sabine Pass LNG Terminal to Non-Free Trade Agreement Nations* (Order 2961-A).

Order 2961-A denied a late motion to intervene (Motion to Intervene (DOE/FE)) filed by Sierra Club some sixteen months after the due date established in a Notice of Application published in the Federal Register (Notice of Application (DOE/FE)).³ Based on DOE/FE's independent review of the environmental assessment (EA) adopted by the FERC and the Commission's orders authorizing the siting, construction, and operation of the Liquefaction Project, Order No. 2961-A also found that the environmental condition that had been placed on the export authorization in Order No. 2961 had been met. DOE/FE concluded that there was no need or sufficient justification to supplement the environmental review conducted by the FERC, provided that Sabine Pass complied with 55 mitigating environmental conditions developed in the FERC proceeding.

Sierra Club submitted a pleading (Rehearing Request) on September 6, 2012, seeking (1) rehearing of DOE/FE's denial of the untimely Motion to Intervene (DOE/FE); (2) rehearing and withdrawal of Order 2961-A, including the FONSI; and (3) the issuance of a stay of Order 2961-A pending the resolution of Sierra Club's request for rehearing and any

² 42 U.S.C. § 4321, *et seq.*

³ The Notice of Application (DOE/FE) was issued on October 5, 2010, and was published in the Federal Register on October 12, 2010. 75 FR 62512. The Notice established a due date for motions to intervene, protests, and comments of December 13, 2010. Sierra Club did not file its Motion to Intervene (DOE/FE) until April 18, 2012.

subsequent judicial review.⁴

For the reasons set forth herein and in Order 2961-A, DOE is denying Sierra Club's request for rehearing of the denial of the late-filed Motion to Intervene (DOE/FE). DOE also is dismissing the requests for rehearing of Order 2961-A and for a stay *pendente lite*.

II. BACKGROUND

The Liquefaction Project, if completed, would be constructed within the footprint of the presently existing Terminal. The Terminal was previously approved by the FERC in several proceedings each of which included separate environmental reviews. Specifically, in 2004, the FERC issued an order authorizing Sabine Pass LNG, an affiliate of the applicant in this proceeding, to site, construct, and operate "Phase I" of the Terminal as an LNG import facility. *Sabine Pass LNG, L.P.*, 109 FERC ¶ 61,324 (2004). In 2006, the FERC authorized the construction of Phase II of the Terminal, consisting of an additional three LNG storage tanks and expanded vaporization systems. *Sabine Pass LNG, L.P.*, 115 FERC ¶ 61,330 (2006). The analysis of the potential environmental impact associated with the siting, construction, and operation of the Phase I and Phase II import facilities appeared in a Final Environmental Impact Statement (FEIS) issued November 2004 and in an EA issued May 2006. In 2009, the FERC authorized Sabine Pass to operate the Terminal for the additional purpose of re-exporting foreign-sourced LNG. *Sabine Pass LNG, L.P.*, 127 FERC ¶ 61,200 (2009). The analysis of the potential environmental impact associated with exporting foreign-sourced LNG appeared in yet another EA, issued February 2009.

⁴ Additionally, on November 1, 2012, Sierra Club submitted a Motion to Supplement the Record. Pursuant to section 302(c) of DOE's regulations (10 C.F.R. 590.302(c)), that Motion was denied by operation of law thirty days after it was filed on November 31, 2012. Even absent the denial of the motion by operation of law, we would deny the motion because it was submitted at the rehearing phase of this proceeding and, therefore, was untimely, and also because the supplementary material attached to the motion was available before Sierra Club filed its motion to intervene in this proceeding and is not in any relevant sense new material that could not have been previously introduced when the record to the proceeding was open.

While the FERC is responsible for approving the siting, construction, and operation of LNG terminals, DOE/FE has authority over applications to import or export natural gas, including LNG.⁵ Persons seeking authority to liquefy and export natural gas from new facilities must seek separate but related authorizations from each agency. Both agencies apply the same legal standard under section 3 of the Natural Gas Act whereby an application must be approved unless it is demonstrated that the authorization sought is inconsistent with the public interest. When, as here, an applicant seeks authority both to export LNG and to construct a terminal for that purpose, the agencies typically work together to avoid unnecessary duplication of effort in the environmental review required under NEPA. In such cases, the FERC is the “lead agency” and DOE/FE is a “cooperating agency” within the meaning of the regulations of the Council on Environmental Quality (CEQ).⁶

The present case fits within that framework. In a letter issued August 4, 2010, in FERC Docket No. PF10-24-000, the Commission approved Sabine Pass’s request to begin a “pre-filing” proceeding for the Liquefaction Project. The pre-filing proceeding involves a public scoping process to determine the range of issues needing environmental review under NEPA.

At the completion of the pre-filing, or scoping, proceeding, Sabine Pass filed a formal application with the Commission in FERC Docket No. CP11-72-000 to site, construct, and operate the Liquefaction Project. The Commission authorized the siting, construction, and operation of the Liquefaction Project in an order issued April 16, 2012 (April 16 order) and, on July 26, 2012, the Commission denied Sierra Club’s requests for rehearing and for a stay

⁵ See, section 3 of the Natural Gas Act, 15 U.S.C. § 717b, and section 301(b) of the DOE Organization Act, 42 U.S.C. § 7151(b).

⁶ The CEQ regulations implementing NEPA define “cooperating agency” as “any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect” to proposed actions for which a NEPA analysis is prepared. See 40 C.F.R. § 1508.5 (2011).

pendente lite (July 26 order). Sierra Club did not submit a petition for judicial review of the Commission's actions within the time prescribed by statute.

At approximately the same time that the FERC was engaged in its NGA section 3 review of the Liquefaction Project, DOE/FE undertook an NGA section 3 review of the proposal to export LNG. Because both the FERC proceeding and the DOE/FE proceeding required a review of the environmental impacts posed by the related applications, DOE/FE became a cooperating agency in the FERC's environmental review of the Liquefaction Project. As noted above, DOE/FE conditionally approved the proposed exports of LNG in Order 2961, issued May 20, 2011. In Order 2961-A, issued August 7, 2012, DOE/FE denied Sierra Club's late intervention; lifted the environmental condition placed on the export authorization in Order 2961; found that it had not been demonstrated that the requested authorization was inconsistent with the public interest; and granted the authorization requested by Sabine Pass subject to certain further conditions, including the 55 mitigating environmental measures adopted by the FERC in its related orders.

Additional description of the procedural history of the FERC and DOE/FE proceedings is set forth in sections III and IV of Order 2961-A. That history is hereby incorporated by reference.

III. SIERRA CLUB'S POSITION

A. Sierra Club's request for rehearing of the order denying its motion to intervene out of time

1. Good Cause. In its Rehearing Request, Sierra Club contends that DOE/FE erred in Order 2961-A when it determined not to grant Sierra Club's late-filed Motion to Intervene (DOE/FE). Sierra Club reasserts the position set forth in its Motion to Intervene (DOE/FE) that it has demonstrated good cause for its late intervention because the questions it seeks to

raise could not have been brought forward prior to the completion of FERC's environmental review in the April 16, 2012, order. Rehearing Request at 3, *et seq.* Sierra Club also argues that DOE/FE's determination in Order 2961 to conditionally approve Sabine Pass's export authorization subject to the completion of environmental review at the FERC constituted a signal to the public that the environmental phase of this proceeding would not commence until the FERC had completed its EA. Rehearing Request at 4. Sierra Club states that it has submitted "extensive information 'material to the proceeding'" and that

the issue is not whether Sierra Club was generally aware [of] DOE/FE's proposed process for addressing environmental concerns, but whether Sierra Club had good cause for intervening when it became clear that DOE/FE's FERC-dependent process would not satisfy the Office's legal obligations.

Rehearing Request at 7.

Referring to Order 2961 and to DOE/FE's Notice of Application (DOE/FE),⁷ Sierra Club further insists that DOE/FE had indicated that it was going to conduct a separate phase of this proceeding upon completion of the FERC's environmental review and that "DOE/FE cannot both defer its environmental analysis to this later proceeding and then deny environmentally-interested citizens the right to participate in the very proceeding it has set aside to consider these issues." Rehearing Request at 5. According to Sierra Club, such an approach is inconsistent with DOE/FE's NEPA responsibilities because it "would prevent citizens from intervening to comment upon the adequacy, and legality, of its NEPA process." Rehearing Request at 5. Sierra Club also maintains that DOE/FE had a legal obligation to independently review the EA prepared by the FERC and to determine whether the EA meets the needs of this agency, as distinct from FERC. The Sierra Club implies that DOE/FE did not conduct such an independent review and that such a review could not have been adequately conducted without

⁷ 75 FR 68,347, 68,347-48 (Oct. 29, 2010).

permitting Sierra Club's intervention in this proceeding.

2. Undue Prejudice. In addition to contesting the finding in Order 2961-A that no good cause had been demonstrated to permit its late intervention, Sierra Club's Rehearing Request challenges the determination in Order 2961-A that granting the late intervention would unduly prejudice the parties to this proceeding but that denying the late intervention would not unduly prejudice Sierra Club. Rehearing Request at 6, *et seq.* Sierra Club argues that DOE/FE did not cite evidence to support the finding in Order 2961-A that it was "reasonable to conclude" that Sabine Pass's business interests would be adversely affected by further delay in issuing the requested export authorization.⁸ Additionally, Sierra Club claims that DOE/FE rushed to judgment in issuing an authorization to Sabine Pass and that the agency's actions are not mandated by any "statutory or regulatory time table." Rehearing Request at 7. Sierra Club further accuses DOE/FE of having acted contrary to a statement in a February 2012 Letter from Deputy Assistant Secretary Christopher Smith to a member of Congress. Rehearing Request at 7.

Sierra Club further contends that it has been prejudiced by a denial of its intervention in this proceeding. It alleges that DOE/FE erred in finding in Order 2961-A that Sierra Club had an opportunity to argue its position regarding environmental impacts in the FERC proceeding. In this regard, Sierra Club states that "[i]t would be awkward, to say the least, for Sierra Club to litigate before FERC whether the EA is sufficient to meet DOE/FE's NEPA obligations. Nor could it litigate before FERC whether the environmental impacts of this export proposal – as must be detailed in any legally compliant NEPA analysis – are in the public interest." Rehearing Request at 7.

⁸ *Citing*, Order 2961-A at 26.

B. Sierra Club's request for rehearing of Order No. 2961-A and motion for a stay *pendente lite*

In addition to challenging the denial of its late-filed motion to intervene, Sierra Club seeks rehearing of the substantive determination in Order 2961-A to issue an export authorization to Sabine Pass. Sierra Club also requests DOE/FE to issue an immediate stay of the Sabine Pass authorization pending resolution of its motion for rehearing of Order No. 2961-A and any judicial appeal of DOE/FE's decision thereon.⁹

With respect to its motion for a stay, Sierra Club asks that DOE use "the general four-factor test used for stays of agency or judicial orders" set forth in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958)):

- (1) the movant's showing of a substantial likelihood of success on the merits;
- (2) irreparable harm to the movant;
- (3) substantial harm to the nonmovant; and
- (4) public interest.

Sierra Club maintains that it has met all four factors. First, it argues that it has demonstrated a substantial likelihood of success on the merits because "[i]nduced production is no less foreseeable than numerous other indirect effects that circuit courts have required agencies to consider under NEPA...." Rehearing Request at 25.

Second, Sierra Club claims that authorization of Sabine Pass's proposed exports will produce immediate and irreparable environmental impacts. Sierra Club asserts that, as other such export authorizations are issued, natural gas producers are likely to begin to increase their production, so that the additional production is available for export when the terminal is ready

⁹ The filing of an application for rehearing does not operate as a stay of the Assistant Secretary's order, unless specifically ordered by the Assistant Secretary. 10 C.F.R. § 590.502.

to commence operation.

Third, Sierra Club asserts that a stay would not substantially harm other parties to the proceeding. It maintains that construction of the LNG export facilities is a multi-year process, which Sabine Pass initiated in 2010. Sierra Club contends that resolution of its challenge will cause only a few months of delay and that this delay will impose minimal hardship.

Fourth, Sierra Club asserts that the public interest warrants a stay because the export of LNG would represent a major shift in the United States' energy policy and marketplace. According to Sierra Club: "It serves the public interest to ensure that the ramifications of this sea change are fully understood before the nation commits to LNG export" and that "it would be contrary to the public interest to allow Sabine Pass to embark on this departure from prior policy while these issues are still being resolved." Rehearing Request at 25.

IV. SABINE PASS' ANSWER TO MOTION FOR A STAY *PENDENTE LITE*

On September 21, 2012, the applicant filed the *Answer of Sabine Pass Liquefaction, LLC in Opposition to Motion of Sierra Club for Stay* (Answer). Sabine Pass contends that because Sierra Club lacks standing to seek rehearing or judicial review of Order 2961-A, including the FONSI (because Sierra Club is not a party to this proceeding), it also lacks standing to seek a stay of those matters pending action on rehearing or judicial review.¹⁰

Even assuming that Sierra Club had standing to seek a stay, Sabine Pass maintains that Sierra Club has not satisfied the four requirements set forth in *Virginia Petroleum Jobbers*. Sabine Pass points out that the FERC has already rejected a request for a stay of its order

¹⁰ Citing, *Piambino v. Bailey*, 757 F.2d 1112, 1136 n.62 (11th Cir. 1985); *Ameren Services Co.*, 127 FERC ¶ 61,121 at P 36 (2009); and *Southern Cal. Edison Co.*, 124 FERC ¶ 61,157 at P 10 (2008).

authorizing the siting, construction, and operation of the Sabine Pass LNG terminal.¹¹

According to Sabine Pass, the FERC decision focused on the first factor, *i.e.* whether Sierra Club had demonstrated that a denial of the stay would result in irreparable harm to the movant, because the failure to demonstrate “certain and great” harm is grounds to deny the request for a stay without examining the other three factors.¹²

Sabine Pass asks that DOE/FE approach the request for a stay in this proceeding consistent with the FERC precedent. In this regard, Sabine Pass notes that the natural gas exports authorized in Order 2961-A will commence in 2015 and thus the harm forecast by Sierra Club is not imminent. Additionally, Sabine Pass points out that in Order 2961-A, DOE/FE “found that Sierra Club’s unsubstantiated concerns do not establish a causal connection of ‘whether or how the Liquefaction Project and the exports of natural gas from the Project will affect shale gas development.’” Answer at 6, *quoting* Order No. 2961-A at 28. The failure to demonstrate such a causal connection, according to Sabine Pass, rebuts Sierra Club’s claim that natural gas producers are likely to increase their production in anticipation of export and shows that as a matter of law Sierra Club has not met its burden of showing irreparable harm and is not entitled to a stay.

On the other hand, Sabine Pass also argues that a grant of the stay would cause it irreparable harm. Specifically, Sabine Pass states that it has incurred substantial development costs, has entered financing arrangements, and recently commenced construction of the Liquefaction Project. Sabine Pass maintains that a stay would result in a delay in construction, which in turn would lead to increased construction and other costs. Answer at 6.

¹¹ See *Sabine Pass Liquefaction, LLC*, 140 FERC ¶ 61,076 at PP 34-35 (2012).

¹² Citing, *Devon Power LLC*, 119 FERC ¶ 61,150 at P 21 (2007); *accord Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020 at P 17 (2011).

Further, because DOE/FE has already determined that the Liquefaction Project is consistent with the public interest, Sabine Pass contends that granting a stay would be contrary to the public interest. In particular, Sabine Pass claims that a stay would deny the communities of Southwestern Louisiana stable jobs, tax revenues, and other economic benefits associated with the construction of the Liquefaction Project on the basis of a speculative argument that already has been rejected by both DOE/FE and FERC.

In addition, Sabine Pass argues that a stay is unwarranted because Sierra Club has not demonstrated a likelihood that it would succeed on appeal, even assuming it had standing to seek appeal. According to Sabine Pass, there is no reasonable likelihood that DOE/FE's determination to deny Sierra Club's late intervention would be overturned. Sabine Pass points out that a denial of intervention can be overturned only for abuse of discretion. *Citing, City of Orrville, Ohio v. FERC*, 147 F.3d 979, 990-91 (D.C. Cir. 1998); *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978). In this respect, Sabine Pass adds: "[a]gencies must have the ability to manage their own dockets and set reasonable limitations on the processes by which interested persons can support or contest proposed actions." *California Trout v. FERC*, 572 F.3d 1003, 1007 (9th Cir. 2009).

V. DISCUSSION AND CONCLUSIONS

A. **Sierra Club has not demonstrated good cause for granting rehearing of the denial of its motion to intervene out of time.**

A Federal Register Notice published October 12, 2010 gave the public until December 13, 2010 to submit motions to intervene, protest, and/or comment in this proceeding. Sierra Club did not move to intervene until April 18, 2012, sixteen months after the deadline and nearly twelve months after issuance of Order 2961. As explained below, none of Sierra Club's arguments establish good cause for its failure to intervene over such an extended period.

1. Sierra Club had notice of the scope of FERC's environmental review

Sierra Club's principal asserted justification for why it had good cause to intervene sixteen months late is that it could not have known that FERC's EA would be legally deficient prior to FERC's April 16, 2012, order. The alleged legal deficiency identified by Sierra Club concerns the scope of FERC's environmental review, and specifically FERC's decision not to include an analysis of national environmental impacts such as induced natural gas production activities in its EA.

As a party to FERC's proceeding, Sierra Club had the opportunity to seek judicial review of FERC's order if it believed the order was premised on a legally deficient environmental review. Therefore, it is unclear as a threshold matter why Sierra Club's assertion that the FERC committed a legal error provides good cause to intervene late in this proceeding. In any event, Sierra Club's claim that it could not have known the scope of FERC's environmental review prior to April 16, 2012, is contradicted by the facts of record. On at least five occasions prior to April 16, 2012, the public was put on notice that the scope and content of environmental review was under review and, on four of those occasions, the public was invited to participate in the development of the record comprising that review. These include:

- a. Notice of Application (DOE/FE).** The Notice of Application (DOE/FE) issued by this agency on October 10, 2010, and published in the Federal Register on October 12, 2010,¹³ put the public on notice both that (a) Sabine Pass was requesting DOE/FE to issue a conditional authorization where the condition involved having the FERC conduct the NEPA environmental review; and (b) DOE/FE would be considering environmental issues in this proceeding and would meet its NEPA obligations prior to issuing an order on the pending application.

¹³ 75 FR 62,512.

The Notice of Application (DOE/FE) called on interested persons to submit comments, protests, and/or motions or notices to intervene no later than December 13, 2010. In response, DOE/FE received seven letters in support of the application and five timely filed motions to intervene. Sierra Club made no filing to intervene in, comment on, or protest the Sabine Pass application by the December 13, 2010, deadline.

- b. Notice of Intent (FERC).** On October 29, 2010, the FERC issued a *Notice of Intent to Prepare an Environmental Assessment for the Planned Sabine Pass Liquefaction Project and Request for Comments on Environmental Issues* (NOI (FERC)). The NOI (FERC) was mailed to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; other interested persons; and local libraries and newspapers. It also was published in the Federal Register on November 5, 2010.¹⁴ The purpose of the NOI was to publicly announce the opening of the scoping process and to invite public participation in the development of an EA. The NOI also stated that the EA would be used to determine whether preparation of an environmental impact statement (EIS) was more appropriate than the EA alone. NOI at 1. The NOI stressed the importance of public input:

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input during the scoping process will help the Commission staff determine what issues need to be evaluated in the EA. The Commission staff will also use the scoping process to help determine whether preparation of an environmental impact statement

¹⁴ 75 FR 68,347.

(EIS) is more appropriate for this Project based upon the potential significance of the anticipated levels of impact.

NOI at 1.

In a section entitled “Involvement of the Department of Energy,” the NOI stated that DOE/FE had agreed to participate as a cooperating agency in the preparation of the EA “*to satisfy its NEPA responsibilities.*” NOI at 2 (emphasis added). The purpose of DOE’s participation as a cooperating agency was restated at page 5 of the NOI: “Currently, the DOE has expressed its intention to participate as a cooperating agency in the preparation of the EA *to satisfy its NEPA responsibilities related to this Project.*” (emphasis added).

The NOI provided interested persons thirty days, until November 29, 2010, in which to submit comments on the appropriate scope of the EA. In response, the FERC received five environmental comment letters and interventions from citizens/interested persons, three letters from public interest groups, and five letters from public agencies.¹⁵ None of these commenters argued that the FERC ought to consider national environmental impacts such as induced natural gas production in its review. Sierra Club did not file comments by the November 29, 2010, date set forth in the NOI. Nor did it subsequently seek to comment on or otherwise participate in the pre-filing proceeding.¹⁶

c. Notice of Application (FERC). On January 31, 2011, Sabine Pass submitted

¹⁵ See *Notice of Schedule for Environmental Review of the Sabine Pass Liquefaction Project*, issued December 16, 2011, in FERC Docket Nos. CP11-72-000 and PF10-24-000, at 2.

¹⁶ The FERC record indicates that, on September 16, 2010, Sabine Pass conducted a public open house for the receipt of additional public comments at the Johnson Bayou Community Center in Johnson Bayou, LA. Additionally, during the pre-filing process, FERC staff engaged in extensive efforts to gather information in the form of “resource reports” submitted by the applicant on various possible environmental impacts of the proposed facilities. However, there is no indication in the record that representatives of Sierra Club participated in the September 16 open house or that Sierra Club attempted to submit comments on the resource reports or otherwise supplement the record in the pre-filing proceeding.

its formal application to the FERC in Docket No. CP11-72-000 seeking authorization to site, construct, and operate the Liquefaction Project. On February 11, 2011, the FERC issued a Notice of Application (Notice of Application (FERC)). The Notice of Application (FERC) stated that the pre-filing proceeding had ended and that further proceedings before the Commission in connection with the Liquefaction Project would be conducted in Docket No. CP11-72-000. The Notice of Application (FERC) also stated that interested persons had two ways to become involved in the formal application docket—either by filing a motion to intervene in the proceeding as a party or filing comments without a formal request to become a party. The due date for these submissions was March 4, 2011.

This Notice was published in the Federal Register on February 18, 2011, at 76 FR 9,573. In response, the Commission received eight timely filed motions to intervene; four of these included comments and one of the four also contained a protest of the application.¹⁷ Sierra Club was not one of the timely interveners, commenters, or protestors.

- d. Order 2961.** Order 2961, issued May 20, 2011, contained the following statement reflecting DOE's active participation in the FERC's environmental review under NEPA:

On August 4, 2010, the Director of the Office of Energy Projects of the Federal Energy Regulatory Commission (Commission) issued a letter order in Docket No. PF10-24-000, granting Sabine Pass' request to commence the Commission's mandatory National Environmental Policy Act (NEPA) pre-filing review process for the Sabine Pass Liquefaction Project. The potential environmental impact of the Sabine Pass

¹⁷ See *Order Granting Section 3 Authorization*, 139 FERC ¶ 61,039 (2012) at 5.

Liquefaction Project will be reviewed by the Commission in conjunction with this proceeding. DOE/FE is a cooperating agency in that review process.

Notably, DOE/FE gave no indication in Order 2961 that it would initiate a second environmental review with new opportunities to intervene after the FERC had completed its NEPA review. We observe in this connection that the Sierra Club waited some twelve months after the issuance of Order 2961 to file its Motion to Intervene (DOE/FE) instead of promptly raising with DOE/FE its view that there should be a further environmental review at DOE/FE with its own intervention opportunity after the FERC had completed its then-ongoing NEPA review.

- e. **Notice of Availability (FERC).** On December 28, 2011, the FERC staff issued its EA for the Liquefaction Project along with a *Notice of Availability of the Environmental Assessment for the Proposed Sabine Pass Liquefaction Project* (Notice of Availability (FERC)). FERC mailed the EA to federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American tribes; and local libraries and newspapers. The Notice of Availability (FERC) stated that DOE was a cooperating agency in the preparation of the EA. Interested persons were given until January 27, 2012, to submit comments on the EA and the invitation to submit comments was not limited to persons that had previously participated in the FERC proceedings. The Notice of Availability was published in the Federal Register on January 4, 2012.¹⁸

Sierra Club did not submit timely comments in response to the Notice of Availability. However, three days after those comments were due, on January 30,

¹⁸ 77 FR 277.

2012, Sierra Club submitted a late *Notice of Intervention, Motion to Intervene, and Comment on the December 28, 2011 Sabine Pass Liquefaction Project Environmental Assessment* in the FERC formal application proceeding (Motion to Intervene (FERC)). This Motion to Intervene was filed more than eleven months after the due date established in the Notice of Application (FERC).

We find that the above five agency issuances—the Notice of Application (DOE/FE); the NOI (FERC); the Notice of Application (FERC); Order 2961; and the Notice of Availability (FERC)—provided ample legal notice of the respective proceedings to establish the scope and content of environmental review as well as DOE’s role as a cooperating agency, participating in the FERC proceedings in order to meet its obligations under NEPA. These issuances also provided the public with multiple opportunities to participate in the pending matters in which they were issued. Sierra Club made no timely response to any of these issuances, and responded to the fourth, Order 2961, by filing its Motion to Intervene (DOE) sixteen months after the due date. Thus, Sierra Club has no factual basis for claiming that it could not have known the scope of the environmental review underway prior to FERC’s final order issued April 16, 2012.

We emphasize that the scope of environmental review established in the pre-filing proceeding was a matter of public record available even to persons that had not intervened in the FERC proceedings. For example, the proposed scope of environmental review was clearly set forth at the outset of the pre-filing proceeding in the July 26, 2010, letter from counsel for Sabine Pass.¹⁹ That letter was made part of the public record and could have been easily viewed by

¹⁹ At pages 7 and 8, the letter states: “Environmental Studies: All Liquefaction Project facilities would be located within the previously-authorized footprint of the existing Sabine Pass LNG Terminal. Additional environmental impacts will be limited to those areas already reviewed and permitted by the Commission and the applicable state and federal permitting agencies...Given the relatively minor additional environmental impacts associated with the Liquefaction Project, Sabine Pass respectfully submits that an Environmental Assessment is sufficient to comply with the requirements of NEPA.”

anyone with an interest in the outcome of the proceeding. Accordingly, if Sierra Club had believed in the last three months of 2010 or any time in 2011 that the scope of review being developed in the FERC proceedings was inadequate for purposes of this proceeding, it could have moved to intervene in this proceeding. Instead, Sierra Club waited until after the FERC issued the April 16, 2012, decision to seek to intervene in this proceeding. There is no good cause to support Sierra Club's late intervention given this course of conduct.

2. Sierra Club's position misconceives and would undermine the NEPA lead-cooperating agency process.

Granting Sierra Club's late intervention would contravene the principal purposes of the lead-cooperating agency process. The lead-cooperating agency process is intended to avoid duplication of effort by agencies with overlapping regulatory authority and to encourage inter-agency coordination in ensuring that a single record developed on environmental matters is complete and adequate for the purposes of both agencies. *See LaFlamme v. FERC*, 945 F.2d 1124, 1130 (9th Cir. 1991) ("[W]hen a lead agency prepares environmental statements, there is no need for a cooperating agency to duplicate that work."); *see also Sierra Club v. Army Corps of Engineers*, 295 F.2d 1209, 1215 (11th Cir. 2002) ("Agencies are not required to duplicate the work done by another federal agency which also has jurisdiction over a project. NEPA regulations encourage agencies to coordinate on such efforts.").

Where this agency has publicly indicated that it will be a cooperating agency in the scoping process administered by the FERC, interested parties must participate in that process if they wish to influence the scope of environmental review or, at a minimum, to bring to this agency's attention at the earliest reasonable opportunity the issues which they deem to be specific to DOE/FE's review. Early agency coordination and public participation are encouraged in NEPA review proceedings and are critical to the successful development of an administrative

record on environmental impact issues.²⁰ In this case, Sierra Club declined to intervene in the FERC pre-filing proceeding; did not intervene in the FERC formal application proceeding until the pre-filing proceeding was closed; and did not attempt to intervene in this proceeding until the FERC completed its environmental review and issued a decision on the merits. We do not believe that Sierra Club has substantiated good cause for its late intervention based on this record.

3. Order 2961 did not open a new proceeding to examine environmental impacts.

Sierra Club claims that DOE/FE's conditional approval of Sabine Pass's application in Order 2961 evinced an intent to reopen the window for intervention on environmental issues in this proceeding following the completion of the FERC's environmental review.

As explained below, this claim is factually incorrect. Even if it were correct, however, it would do little to advance Sierra Club's claim of good cause. Order 2961 was issued May 20, 2011. Sierra Club did not move to intervene until April 18, 2012, eleven months after Order 2961 and over three months after FERC published the EA on December 27, 2011. Thus, even if Order 2961 had somehow initiated a new phase of the proceeding to examine environmental impacts, which it did not, Sierra Club sat on its rights in that proceeding as well.

In any event, the facts do not support Sierra Club's characterization of Order 2961. Sierra Club has not pointed to any statement by DOE/FE that it would commence a new phase of the proceeding. To the contrary, the Order made clear that DOE/FE was actively engaged in the ongoing FERC environmental review, not that it intended to create a new proceeding. Order 2961 at 3, n.8.

²⁰ See, 40 CFR 1500.2 (Policy); 40 CFR 1500.5 (Reducing delay), 40 CFR 1501.6 (Cooperating agencies), and 40 CFR 1506.6 (Public involvement).

Sierra Club's claim that Order 2961 created or ought to have created a new intervention opportunity for environmental issues is not supported by CEQ and DOE regulations and internal DOE standing orders. As a cooperating agency, DOE/FE independently reviewed the EA and the FERC orders and concluded that further environmental review, including the preparation of an EIS, was unnecessary to meet its legal obligations. Neither Sierra Club's intervention in this proceeding nor the commencement of a new round of environmental proceedings within this proceeding was necessary for DOE to conduct its independent review of the FERC EA. The CEQ regulations that DOE has adopted provide that "DOE shall cooperate with the other agencies in developing environmental information and in determining whether a proposal requires preparation of an EIS or EA, or can be categorically excluded from preparation of either." 10 C.F.R. § 1021.342. The regulations further provide that DOE/FE "may adopt *without recirculating*" another agency's EA if, "after an independent review" of the EA, DOE/FE "concludes that *its* comments and suggestions have been satisfied." 40 C.F.R. 1506.3(c) (emphasis added); *see also Council on Environmental Quality Guidance Regarding NEPA Regulations*, 48 FR 34263, 34265-66 (July 28, 1983) (CEQ regulations regarding adoption of an EIS should be applied to allow the adoption of an EA); DOE Order No. 451.1B section 5(a)(9)(d) (Jan.19, 2012) (DOE National Environmental Compliance Program) (anticipating adoption of EAs prepared by other agencies and designating to each Secretarial Officer the authority to adopt another agency's EA and issue a FONSI).

Further, we are unpersuaded by Sierra Club's claim that there is good cause to grant its intervention out of time in this proceeding because it would have been "awkward" or inappropriate for Sierra Club to ask the FERC to rule on an issue that is allegedly pertinent to this proceeding but not to the FERC proceedings. The FERC granted Sierra Club's late Motion

to Intervene (FERC) in the formal application proceeding and Sierra Club raised substantively the same issues regarding the appropriate scope of environmental review before the FERC that it has raised in this proceeding.²¹ If Sierra Club had believed that it should not or could not raise issues relating to the scope of environmental review in the FERC proceedings, its conduct indicates otherwise.

Based on the foregoing, Sierra Club has not established good cause for having waited until after the FERC's issuance of the April 16 order to seek intervention in this proceeding.

B. Sierra Club has not demonstrated that it would be unduly prejudiced by a denial of its intervention, whereas the record shows that a grant of Sierra Club's request to intervene would unduly prejudice the applicant.

Sierra Club contends that its intervention would not have negative impacts on this proceeding and that declining to allow its intervention will unduly prejudice its interests. Sierra Club also accepts none of Sabine Pass's assertions of harm that would arise from a grant of its late intervention and the commencement of a new phase of environmental review in this proceeding. Additionally, Sierra Club argues that DOE/FE cited no evidentiary support for its finding in Order 2961-A that it was "reasonable to conclude" that Sabine Pass would be negatively affected by a grant of the motion to intervene.

Contrary to the implication of Sierra Club's pleading, Sierra Club has not been unduly prejudiced by a denial of its Motion to Intervene (DOE/FE) or its Rehearing Request. As explained in Order 2961-A, Sierra Club was granted intervener status at the FERC and was permitted a full opportunity to present substantially identical concerns to those it argues here. It bears repeating that DOE was a cooperating agency in the FERC proceeding and the public

²¹ See, Order 2961-A at 9, *et seq.* for a summary of the arguments presented by Sierra Club in the FERC proceedings.

record clearly indicated that DOE intended to carry out its NEPA responsibilities by means of its participation in the FERC proceeding. While this fact did not obviate DOE's responsibility to independently assess the findings contained in the EA and FERC orders, it meant that questions regarding environmental impacts of the present export application should have been raised within the FERC proceedings. Indeed, Sierra Club took advantage of this opportunity and, therefore, its claim of undue prejudice as a consequence of a denial of its motion to intervene in this proceeding is without merit.

Furthermore, we reject Sierra Club's claim that there would be no negative impact to Sabine Pass if Sierra Club's intervention is granted. Extending intervenor status to Sierra Club would provide it with the right to seek rehearing and judicial review of DOE/FE's decisions in this proceeding. There can be no doubt of the delay, expense, and uncertainty to the applicant and to other parties associated with the prospect of additional agency proceedings and subsequent judicial appeals. Notwithstanding Sierra Club's arguments to the contrary, the record contains substantial evidence to reasonably infer that delays in processing the Sabine Pass export application would detrimentally impact the applicant's business interests.²²

In short, Sierra Club's legal interests were protected and it will not be unduly prejudiced by a denial of its late Motion to Intervene (DOE/FE). On the other hand, we continue to find that the applicant's claims regarding the prejudice that would arise from further administrative and,

²² Sabine Pass stated in its May 3, 2012, answer to Sierra Club's motion to intervene that it had dedicated tens of millions of dollars to develop the Liquefaction Project and was preparing to spend \$6 billion on Phase I and to make additional investments in Phase II of the Liquefaction Project. In its September 21, 2012, answer to Sierra Club's motion for a stay pendente lite, Sabine Pass emphasized that a delay in construction would drive the costs of construction higher. While a grant of the motion to intervene would not put a stay on construction activities, the uncertainty occasioned by granting intervenor status to Sierra Club, including the fact that Sierra Club is seeking a stay of the authorization pending the issuance of a final agency action and judicial review, would have a chilling effect on the financing of construction as well as the construction activities themselves—all at the predictable expense of the applicant.

potentially, judicial proceedings following on this proceeding are reasonable.²³ On balance, therefore, we reject Sierra Club's position that it will be unduly prejudiced by the denial of its Motion to Intervene (DOE) and we find that a grant of the Motion would unduly prejudice the applicant.

We further reject as both incorrect and irrelevant Sierra Club's claim that Order 2961-A is contrary to a statement made by Christopher Smith, Deputy Assistant Secretary for Fossil Energy, in a February 24, 2012, letter to U.S. Representative Edward Markey. In that letter, Deputy Assistant Secretary Smith stated that DOE/FE would issue no final order addressing "pending applications" to export LNG until it had completed a two-part study that the agency had commissioned to evaluate the cumulative macroeconomic impacts of exports of domestically produced LNG. In the context of the letter, sent nine months after Order 2961, it is plain that "pending applications" referred to the applications subsequent to Sabine Pass's application. In any event, it is unclear what, if any, legal import this letter carries or how it could possibly justify Sierra Club's failure to intervene over a year earlier.

C. Sierra Club lacks standing to seek rehearing of the substantive determinations in Order No. 2961-A and the request for rehearing will be dismissed.

Under section 19 of the Natural Gas Act, 15 U.S.C. § 717r, only parties to agency proceedings may submit requests for rehearing. DOE/FE has no discretion to waive or extend these requirements. Also see section 590.501(a) of DOE's regulations, 10 C.F.R. 590.501(a).

²³ Under other circumstances, where required to ensure a thorough public interest analysis, DOE/FE has accepted the need to delay the disposition of LNG export applications even at a potentially significant cost and business risk to applicants for export authority. Thus, as indicated in Order 2961, DOE identified the need for an analysis of the cumulative macroeconomic impacts of a succession of LNG export authorizations. Order 2961 at 32-33. Pursuant to that finding, DOE/FE has been holding similar applications subsequent to the one under consideration in this proceeding in abeyance pending the outcome of the macroeconomic study.

Because Sierra Club lacks standing to seek rehearing, dismissal is appropriate with respect to the request for rehearing of the substantive determinations in Order 2961-A.

D. Because Sierra Club lacks standing to seek rehearing and judicial review of Order No. 2961-A, its motion for a stay *pendente lite* will be dismissed.

As indicated above, Sierra Club lacks standing to seek rehearing of Order 2961-A or judicial review thereof. Because Sierra Club has no standing to pursue further review either before this agency or on appeal, no purpose would be served by issuing a stay pending the completion of the administrative process or judicial review. Therefore, the motion for stay *pendente lite* will be dismissed.

ORDER

Pursuant to sections 3 and 19 of the Natural Gas Act, and for the reasons set forth above and in Order No. 2961-A, it is ordered that:

- A. Sierra Club's request for rehearing of the denial of its motion to intervene in Order No. 2961-A is denied.
- B. Sierra Club's request for rehearing of Order No. 2961-A is dismissed.
- C. Sierra Club's motion for a stay *pendente lite* is dismissed.

Issued in Washington, D.C., on January 25, 2013.

A handwritten signature in black ink, appearing to read "John A. Anderson", written over a horizontal line.

John A. Anderson
Manager, Natural Gas Regulatory Activities
Office of Oil and Gas Global Security and Supply
Office of Fossil Energy